Supreme Court, U.S.
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No. 02 12

In The

Supreme Court of the United States

Christopher Langdon, Petitioner,

v.

Lyndo Tippett, Roy Cooper et al.

consolidated with:

Christopher Langdon, Petititoner,

v.

J.J. Swain, Jack Murdock, F.D. Martin et al.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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48 pg

QUESTIONS PRESENTED FOR REVIEW

I filed two complaints in the W.D.N.C. . The defendants in *Langdon v. Swain et al.* are in default and failed to meet any of the requirements to set aside the default. Instead of entering a default and a default judgment, the district court consolidated the cases and dismissed them *sua sponte*, without notice and opportunity to be heard, under 28 U.S.C., Section 1915(e)(2), the informa pauperis statute, despite the fact that neither case was filed under 28 U.S.C. 1915 and no other federal court has ever dismissed a fully paid, non-prisoner, non-in forma pauperis complaint under 28 U.S.C. 1915. The Fourth Circuit of the U.S. Court of Appeals affirmed.

(1) May a fee-paid (in full), non-prisoner, non-informa pauperis complaint be dismissed under the informa pauperis statute, 28 U.S.C., Section 1915(e)(2) ?

(2) May a federal court dismiss state law claims, pendent and/or diversity based, via 28 U.S.C., Section 1915(e)(2) ?

(3) Are the pleadings and papers of a *pro se* party required to be liberally construed ?

(4) Are suits against state employees, sued in their individual capacities, for the deprivation

of property without just compensation, allowed in the federal courts, contrary to the Fourth Circuit's ruling ?

(5) May a U.S. District Court dismiss a case, *sua sponte*, based on an allegation of *res judicata*, without notice and an opportunity to be heard on the issue?

(6) May a U.S. Court of Appeals dismiss a case, *sua sponte*, for failure to state a claim, without notice and opportunity to be heard ?

(7) When a plaintiff makes a valid request for the entry of default under Rule 55(a), F. R. Civ. Proc., is the entry of default mandatory, or, discretionary ?

(8) May a default be set aside without any showing of a meritorious defense, good faith, lack of prejudice to the plaintiff and without any affidavits ?

(9) Is a plea of *res judicata* waived if not raised at the district court level and, if properly raised, what requirements must be met to prove it ?

(10) Did the district court have jurisdiction to dismiss my claim for the deprivation of my

property ?

(11) Did the district court judge erroneously deny my motion to transfer my cases and my motions to recuse ?

LIST OF PARTIES

I filed two cases that were consolidated: The first case, *Langdon v. Tippett,Cooper et al.* erroneously included the N.C. Dept. of Justice, the N.C. Att. Gen.'s Office and the N.C. Dept of Transportation as defendants.

The second case, *Langdon v. Swain, Martin, Murdock and Henderson,* erroneously included Mr. Henderson because of a clerical error. I had decided that time constraints prevented the inclusion of claims against him in the complaint. He was not served, and claims against him were not included in the complaint.

There are no corporate entities involved in either of these cases.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Christopher Langdon respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in these consolidated cases.

OPINIONS BELOW

The opinions of the District Court are unpublished and appear in the Appendix. The opinion of the Fourth Circuit is unpublished, however, it is reported at 29 Federal Appendix 171 and it is included in the Appendix to this petition.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Fourth Circuit was decided on February 20th, 2002 and amended on March 12th, 2002. The "Petition for Rehearing and Rehearing En Banc" was denied on April 11th, 2002. The jurisdiction of the U.S. Supreme Court is invoked under 28 U.S.C., Section 1254(1).

STATUTORY PROVISIONS INVOLVED

U.S. Constitution Amendments I, V & XIV. N.C. Constitution, Article I, Sections 1, 18 & 19; 28 U.S.C., Sections 1738 & 1915; 42 U.S.C. Sections 1983, 1985, 1986; N.C.G.S.136, Sections 103-112, 40A-51, 1-35,1-51, & 1-53; N.C.G.S.132-1; the Magna Carta.

STATEMENT OF THE CASES

I filed two complaints in the U.S. District Court, W.D.N.C. at Ashevillle, N.C. The first complaint was designated case no: 1:01-cv-107, W.D.N.C., hereafter *Langdon v. Tippett* It challenges the constitutionality of several state statutes that inadequately provide a method for obtaining just compensation for the taking of property. The defendants are Lyndo Tipett, the N.C. Secretary of Transp., Roy Cooper, the N.C. Att. Gen. and, erroneously, the N.C. Dept. of Transp. (N.C.D.O.T.) and the N.C. Dept. of Justice. Only Mr. Tippett and Mr. Cooper are proper defendants in this case under the doctrine of *Ex parte Young.* They were sued for injunctive and declaratory relief only, under 42 U.S.C., Section 1983. Jurisdiction is available under 28 U.S.C., Sections 1331 & 1343.

The second case is *Langdon v. Swain, Martin and Murdock* (case no: 1:01-cv-139). It seeks monetary damages for: denial of meaningful access to the courts and the right to petition the government for a redress of grievances (U.S. Const. Amends. I & V); the taking of property without just compensation (U.S. Const. Amend. V, the Magna Carta, the common law and N.C. Const. Article I, Sections 1,18 & 19), conspiracy (42 U.S.C., Sects.1983,1985, 1986), and fraud.

The defendants in *Langdon v. Tippett and Cooper* filed a timely answer, but no motion to dismiss, nor any other dispositive motion.

The defendants in *Langdon v. Swain , Martin and Murdock*, are in default. The clerk of court and the district court refused to enter a default

and a default judgment, despite these facts: the defendants have never filed an answer, have never filed any affidavits and have never presented a meritorious defense. Instead, the district court consolidated the cases and dismissed them under the in forma pauperis statute, 28 USC, Section 1915(e)(2), despite these facts: neither case was filed under 28 U.S.C. Section 1915; I am not now, nor have I ever been, a prisoner; and no federal court has ever dismissed a non-prisoner, non-in forma pauperis case under 28 U.S.C., Section 1915(e)(2), until now.

Prior to the dismissal, I had asked that the cases be transferred to Charlotte, N.C., that the presiding judge, Judge Thornburgh recuse himself and that the noteholders and trustees holding a lien on my property be enjoined, as required by N.C. law as a pre-requisite to jurisdiction. Although no objections to the motions were filed, they were denied. I was never given notice and opportunity to be heard before my complaints were dismissed.

The 4th Cir. named my appeals 01-1975 and 01-2019 and refused to find the defendants Swain, Martin and Murdock in default, ignored my four unanswered motions for sanctions, and upheld the lower court decisions. The defendants in *Langdon v. Swain, Martin and Murdock* filed no affidavits ever, nor did they present a meritorious defense.

I. ERRONEOUS DISMISSAL UNDER 28 U.S.C., SECTION 1915(e)(2), THE IN-FORMA PAUPERIS STATUTE

Prior to my two cases, no federal court has ever dismissed a fully paid, non- informa pauperis, non-prisoner complaint via the in forma pauperis statute, 28 U.S.C. 1915(e)(2). The full fee was paid for both of my complaints, upon filing. I have never been a prisoner, and I did not file either complaint under 28 U.S.C., Section 1915. I have never asked to file any suit under 28 U.S.C., Section 1915.

The U.S. Supreme Court in *Denton v. Hernandez,* 504 U.S. 25, 118 L. Ed 2d 340, 112 S.Ct. 1728, 1729, 1734 (1992) held that the informa pauperis statute does not apply to a fee paid complaint, including those filed by prisoners. After the passage of the *Prison Litigation Reform Act of 1995* Public Law No: 104-134, Sections 801-810, 110 Stat. 1321 (1996), there has been a dispute among the circuits as to whether or not 28 USC 1915(e)(2) applies to all complaints filed by *prisoners*, if filed in forma pauperis, or not. During the proceedings, not a single case was cited in which a non-prisoner, non-informa pauperis complaint was dismissed under 28 U.S.C. Section 1915(e)(2).

Some circuits have ruled that 28 U.S.C. 1915-(e)(2) applies to non-in forma pauperis complaints filed by prisoners. See: *Plunk v. Givens,* 234 F. 3d 112 (10th Circ. 2000); *Carr v. Dvorin,* 171 F. 3d 115 (2nd Circ. 1999); *Martin v. Scott,* 156 F. 3d 578 (5th Cir. 1998). Other circuits disagree. See :*Porter v. Fox,* 99 F. 3d 271 (8th Cir. 1996); *Benson v. O' Brian,* 179 F. 3d 1014 (6th Cir. 1999).

I repeat, neither of my complaints was filed under 28 U.S.C. 1915 and I am not a prisoner.

Furthermore, *Langdon v. Swain, et al* is against three NCDOT engineers in their individual capacities and includes claims for damages for fraud and deceit that can only be heard under state law. I asked that my claim for the deprivation of my property be heard under state law, and alternatively, federal law. No case law was cited indicating that state law claims may be dismissed under 28 U.S.C. 1915(e)(2).

Furthermore, dismissals under 28 U.S.C., Section 1915(e)(2) are reserved for claims that are frivolous. The defendants in *Langdon v. Tippett* (the constitutional challenge case) never asked that my complaint be dismissed because they believed that it was frivolous, nor did they allege that it was frivolous. The defendants in *Langdon v.Swain* never filed an answer. Frivolous claims have been described as those that are fanciful or delusional. Even if my complaints had been filed *in forma pauperis*, they are not frivolous.

" In forma pauperis complaint is properly dismissed as factually frivolous only if its factual allegations are 'fantastic,' 'delusional,' ..and may be dismissed as legally frivolous only if its claims are based on an 'indisputably meritless legal theory." *Nasim v. Warden, Md. House of Correction*, 42 F. 3d 1472, 1473[2] (Fourth Cir. 1995).

The allegation of frivolousness was based on an alleged defense of *res judicata*, discussed in another section herein in detail. The only authority cited by the courts and the defendants for dismissing my cases was 28 U.S.C. 1915.

II. COMPLAINTS AGAINST STATE OFFICIALS FOR THE DEPRIVATION OF PROPERTY ARE ALLOWED IN FEDERAL COURTS.

Langdon v. Swain, Martin and Murdock, includes claims for the deprivation of my property without compensation that may be heard on a diversity basis and/or a federal basis. Those defendants are being sued in their individual capacities only. They were acting under the color of state law.

The U. S Court of Appeals for the Fourth Circuit *sua sponte* dismissed my claims for the deprivation of my property without compensation, ruling that such complaints are not allowed in federal court against state officials, contrary to decisions by the U.S. Supreme Court and every U.S. Court of Appeals.

The U.S. Supreme Court ruled in *Lynch v. Household Finance,* 405 U.S. 1036, 92 S.Ct. 1113, 31 L. Ed 2d 424 (1972) that property rights are among the civil rights that were intended to be protected by the *Civil Rights Act of 1871,* now 42 U.S.C., Section 1983. In *Weddle v. Director, Patuxent Institution,* 405 U.S. 1036, 92 S.Ct. 1318, 31 L. Ed 2d 577 (1972), the U.S. Supreme Court vacated the Fourth Circuit's ruling at 436 F. 2d 342 (4th Cir. 1970) because Section 1983 suits against state officials for the deprivation of property are allowed. See also: *Siu v. Johnson,* 748 F. 2d 238 (4th Cir. 1984); *Clayton v. Shaw,* 548 F. 2d 155 at 1156 (5th Cir. 1977); *Bayron v. Trudeau,* 702 F. 2d 43 (2nd Cir.1983).

Additionally, the claims for deprivation of my property could have been heard under state law because of diversity of citizenship and/or as pendent state claims.

My claims for the deprivation of my property were dismissed because, allegedly, they failed to state a claim upon which relief could be granted. The claims were dismissed under 28 U.S.C., Section 1915(e)(2). Even *if* my complaint had been filed under 28 U.S.C.1915, dismissal for failure to state a claim would still have been erroneous. The U.S. Supreme Court has ruled that dismissals for failure to state a claim are not allowed under the in forma pauperis statute. *See: Neitzke v. Williams,* 490 U.S.319, 104 L. Ed 2d 338, 109 S.Ct. 1827,1828, 1833 (1989).

I was not given notice and opportunity to be heard on the issue of an alleged failure to state a claim, before, or after, the ruling. My petition for rehearing and rehearing en banc was denied, thereby denying me the opportunity to be heard on the alleged issue. The issue was never raised by the defendants, nor by the district court. Notice and opportunity to be heard are the essentials of due process of law and equal protection under the law. The notice and hearing must be meaningful and at a meaningful time. *See: Armstrong v. Manzo,* 380 U.S. 545, 85 S.Ct. 1187, 14 L. Ed 2d 62 (1965). Most, if not all, circuits, except the Fourth Circuit, require a hearing before a dismissal for failure to state a claim. *See: Local 267 v. Ohio Carpenters Health & Welfare Fund,* 926 F. 2d 550 (6th Cir. -1991); *Morrison v. Tomano,* 755 F. 2d 515 (6th Cir.-1985); *Doe v. St. Joseph's*

Hospital, 788 F. 2d 411 (7th Cir. 1986); *Oatess v. Sobolevitch,* 914 F. 2d 428 (3rd Cir. 1990). Notice and hearing are particularly important with respect to pro se claims.
See: Bayron v. Trudeau, supra.

III. THE PLEADINGS AND OTHER PAPERS OF PRO SE PARTIES ARE TO BE LIBERALLY CONSTRUED.

The Supreme Court has repeatedly ruled that the pleadings and papers of a pro se party, particularly in a civil rights case, must be liberally construed and the pro se party is to be given every opportunity to make their case. If a court fails to do so, it is my understanding that its judgment is subject to reversal. *See: Haines v. Kerner,* 404 US 519 (1971); *Estelle v. Gamble,* 429 U.S. 97 (1976); *Roseboro v. Garrison,* 528 F. 2d 309 (Fourth Cir. 1975). The rule applies in cases where the pro se party is not a prisoner: *Sellers v. M.C. Floor Crafters, Inc.,* 842 F. 2d 639 (2nd Cir. 1988).

It is my understanding that Mr. Justice Breyer, appearing on C-Span on 8-04-2001, stated that most of the people that wanted to file a case and couldn't afford an attorney, were unable to get *pro bono* assistance. Nearly all people that proceed pro se do so because they can't afford an attorney. Bias against pro se parties is a form of economic bias and economic bias is forbidden by the equal protection clause. *See : Harper v. Virginia Board of Elections,* 383 U.S. 663 (1965).

The district court and the U.S. Court of

Appeals never stated that my papers had been liberally construed. I wasn't supplied any information as to any attorneys and/or organizations that might assist me *pro bono.* The Court of Appeals informed me that oral arguments by pro se parties are disfavored. Local Rule 46(g) states: *" Cases involving pro se litigants are ordinarily not scheduled for oral argument,"* a de facto ban on oral arguments by pro se parties.

Because I was not given any hearing before my cases were dismissed by the district court, I sought oral arguments before the Fourth Circuit to make sure that my legal arguments were addressed and fully considered. My motion for oral argument was denied. I doubt that any pro se party has been given the opportunity to participate in oral argument before the Fourth Circuit.

" Pro se civil rights litigant should be afforded every reasonable opportunity to demonstrate that he has a valid claim." Satchell v. Dillworth, 745 F. 2d 781 at 782[5] (2nd Cir. 1984)

I filed a timely motion for an extension of time to file a petition for rehearing, and rehearing en banc. I asked for an additional11 days to file the petition and was denied. I believe the motion should have been granted because I was proceeding pro se and because the Court of Appeals had raised the alleged issue failure to state a claim *sua sponte,* without notice and an opportunity to be heard.

IV. IS THE ENTRY OF A DEFAULT MANDATORY, OR, DISCRETIONARY AND

HOW MAY A DEFAULT BE REMOVED ?

Rule 55(a) of the Federal Rules of Civil Procedure states: " Entry. When a party against whom a judgment for affirmative relief is sought has failedto plead or otherwise defend and that fact has been made to appear by affidavit or otherwise, the clerk shall enter the party's default."

"Shall" in statutes is mandatory. It is my understanding that the proper procedure is for the clerk to enter the default when requested to, if the defendants have not answered. It is then up to the defendants in default to move to have the default set aside.

I made the clerk of court's office aware that the defendants in *Langdon v. Swain* were in default, verbally, and they refused to enter the default. I also mailed a verified motion for default entry to the clerk of court's office via U.S. Express mail, and a verified motion for default judgment. The default was not entered, although the defendants filed no response to the motions and have never filed an answer. However, a party is in default whether or not the default is entered in the docket.

"...the defendants are in a position of having failed to plead or otherwise to defend within twenty days...They are, therefore, in default. There has been no entry of default... But that entry is purely a formal matter." *Orange Theater Corp. v. Rayhertz Amusement Corp., et al.*, 130 F. 2d 185, 187[2] (3rd Cir. 1942).

" However, the entry of default is largely a formal matter..' 6 James W. Moore et al. *Moore's Federal Practice*, Section 55.03[2], at 55-21 (2d

Ed. 1994)." *Pinaud v. County of Suffolk*, 52 F. 3d 1139 at 1152, Footnote # 11 (2nd Cir. 1995).

" ...the entry of default by the clerk is purely a formal matter and the default should be entered by him as of course.." 35 C.J.S., FEDERAL CIVIL PROCEDURE, Section 1123, page 510.

" A party's default is not excused simply because it is not recorded in the docket." *Moore's Federal Practice*, 3d Edition, Section 55.11 [5] (2000).

Some circuits will construe a late filed answer as a motion to set aside a default entry.

" Filing a late answer is analogous to motion to vacate default." *John v. Sotheby's, Inc.*, 141 F.R.D. 29 (S.D.N.Y. 1992)

In *Traguth v. Zuck*, 710 F. 2d 90 at 94 (2nd Cir. 1983), a late filed motion for additional time to answer was construed as a motion in opposition to the entry of default. However, it was filed by a pro se party and contained an allegation of a meritorious defense.

The defendants in the complaint for damages, *Langdon v. Swain, Martin and Murdock* never filed an answer. The defendants did file a motion for an extension of time to answer and two amended motions for an extension of time to answer. The first motion for an extension of time was denied, however, the two amended motions were allowed, although they were signed and mailed beyond the time for filing an answer. In one of the amended motions, a request was made that a default not be entered against defendant Jack Murdock.

Even if the Court were to rule that a late

motion for an extension of time may be construed as a motion to set aside a default, it still must meet all the requirements to set aside a default. Most circuits, if not all, require the following to set aside a default: a reason for not filing a timely answer, supported by an affidavit; a meritorious defense, supported by facts; lack of prejudice to the plaintiff; and a showing of good faith.

" While a default was never entered on the district court docket sheet...Zuck's request should have been considered as a motion to set aside an entry of default...Whether good cause is deemed to have been shown depends upon.. .. 'whether the default was willful, whether setting it aside would prejudice the adversary and whether a meritorious defense is presented." *Traguth v. Zuck*, 710 F. 2d 90 at 94 (2nd Cir. 1983).

" Refusal to set aside default against defendant who did not support his late claim, that favorable evidence could be presented on trial by merits, with affidavits or documents, and who did not specify his potential witnesses, was not abuse of discretion." *Madsen v. Bumb*, 419 F. 2d 4 at 4[4] (9th Cir. 1969).

" The affidavits the defendants filed were no more than conclusory denials and were properly held to be insufficient....the district court did not abuse its discretion in refusing to set aside the default." *Sony Corp. v. Elm State Electronics, Inc.*, 800 F. 2d 317 at 321 (2nd Cir. 1986).

" A court generally may.. extend the time within which the defendant must plead..The

defendant typically must show that he or she has a meritorious defense." 71 C.J.S. PLEADING, Section 169, page 222 (2001).

" In most cases.. the court will require the party in default to demonstrate a meritorious defense to the action..A majority of the courts .. have refused to accept general denials or con clusory statements that a defense exists ." *Federal Practice & Procedure*, Wright, Miller & Kane, Chapter 8, Section 2697, pages 155-56, 160 (1998)

In one of the amended motions for an extension of time to answer, it was alleged that there was some confusion as to when the defendants were required to file an answer. No details were provided and no affidavit was submitted to support the assertion.

Defendants Swain, Martin and Murdock never filed a single affidavit with the district court, nor with the Court of Appeals. They never asserted in any of their motions for an extension of time (Exhibits 3 & 4) that they had a meritorious defense, nor did they cite any facts to support a meritorious defense. They did not assert in the motions that I, the plaintiff, would not be prejudiced by an extension of time.

Mr. Murdock's "excuse" for failing to timely answer was an assertion that he failed to answer because he threw the complaint and summons away because he believed that they were related to a state case against him. That is contumacious behavior, exhibiting bad faith.

The late filed amended motions for an extension of time to answer were allowed and my verified motions for default entry and default

judgment were denied by Magistrate Judge Cogburn, stating that the failure to file a timely answer *appeared* to be due to "excusable neglect," indicating his uncertainty.

The failure of Swain, Martin and Murdock to answer is inexcusable because, more than two weeks before an answer was due, I mailed a letter to them, urging them to timely respond. It was also faxed to Swain and Martin, and was mailed to Mr. Crawford, their attorney. On July 9th, 2001, I called Mr. Crawford to discuss a motion in *Langdon v. Tippett.* Mr. Crawford mentioned that his office had received a copy of *Langdon v. Swain, Martin and Murdock.* I asked him if he wished to discuss the case and he said no.

Mr. Crawford never attempted to discuss any of the motions for an extension of time to answer before filing them, and there is no statement in any of the motions for an extension of time to answer that indicates that the counsel for the defendants attempted to discuss them with me, contrary to local rule 7.1(A), of the W.D.N.C. The 4th Cir. was aware of these facts through verified documents and a copy of the letter. No denials of these facts were offered by the defendants, or, their attorneys.

" An attorney opposed only by a *pro se* litigant is not permitted to sit back blithely and not discharge the responsibility to confer simply because there is not an attorney on the other side." *Harrell v. U.S.*, 117 F.R.D. 86, 91 (E.D.N.C.).

At the appeals court level, defendants Swain, Martin and Murdock gave no additional "excuses" for failing to file a timely answer, or,

a timely motion for extension of time to answer, and no affidavits. I filed over 15 verified documents with the lower courts.

The defendants, in their "Appellee's Brief," argued that excusable neglect was the reason for their failure to answer, however, they did not mention it in any of their motions for an extension of time. The 4th Circuit agreed, erroneously relying on *Pioneer Investment Services v. Brunswick Associates,* 507 U.S. 380,123 L. Ed 2d 74, 113 S.Ct. 1489 (1993). In that case the Court ruled that the failure to timely file proofs of claim was the result of excusable neglect because the notice of the filing date was placed obscurely in the court papers (113 S. Ct. at 1491). It is my understanding that the attorney who missed the deadline filed an affidavit explaining why he missed the deadline. Affidavits are essential. *See: Robinson v. Bantam Books,* 49 F.R.D. 139 at 141 (S.D.N.Y. 1970), citing *Standard* Newspapers *v. King,* 375 F. 2d 115 (2d Cir. 1967); *Thompson v. Wooster,* 114 U.S. 104, 5 S.Ct. 788 (1885);

Furthermore, the decision in *Pioneer* does not apply to failures to timely file where there is an unambiguous rule and the failure to file is within the party's own control. See: *Kyle v. Campbell Soup Co.,* 28 F. 3d 928, 931-932 (9th Cir. 1994); *Thompson v. E.I. Du Pont de Ne-mours & Co., Inc.,* 76 F. 3d 530 (4th Cir. 1996).

The decision in *Pioneer* indicates that if there is any sign of bad faith, excusable neglect should not be found(113 S. Ct. at 1500). I gave numerous, verified examples of the bad faith conduct of defendants Swain, Martin and

Murdock in my verified complaint, verified brief, verified reply brief and four verified motions for sanctions. The defendants only response was their brief at the appeals level, unverified and without affidavits. They filed no responses to my four, detailed, documented, verified, motions for sanctions. All of the verified, documented allegations of the bad faith conduct of defendants Swain, Martin and Murdock should have been deemed admitted.

" ...we must accept as true the movant's undenied allegations. *Lonsdorf v. Seefeldt,* 47 F. 3d 893, 897 (7th Cir. 1995)," *Tobel v. City of Hammond,* 94 F. 3d 360 at 362 [4] (7th Cir. 1996).

One egregious example of bad faith is the assertion that Murdock failed to answer, or, timely file an extension of time, because he threw away the complaint and summons, believing that they were related to a state case (Exhibit # 3). That shows bad faith and it is not entirely credible. I agree that Mr. Murdock intentionally threw away the complaint and summons, however, that doesn't explain why he failed to file an answer, or, a timely motion for an extension of time. He knew they were court documents.

I supplied the Court of Appeals with a verified statement, un-denied by the defendants, that I had spoken with Mr. Murdock's attorney, Mr. Crawford, on 7-09-01, *nine days* before an answer was due by Mr. Murdock. On that day, Mr. Crawford told me that his office had received a copy of *Langdon v. Swain, Martin and Murdock.* The fact that Mr. Murdock had thrown away the complaint and summons is no excuse for his failing to answer.

Also, Mr. Murdock is an engineer, not an illiterate person. It is unimaginable that he mistook a federal complaint and summons for state court papers.

Please note that: " Bad faith may be found not only in the actions that led to the lawsuit, but also in the conduct of the litigation." *Roadway Express v. Piper*, 447 U.S. 752, 100 S.Ct. 2455 at 2464 [16] (1980).

To better understand the defendants' bad faith, it is best to relate the events that led to the destruction of the value of my property in Polk County, N.C., by the defendants, Swain, Martin and Murdock, and how they prevented me from obtaining access to the courts, perpetrated fraud and destroyed my business.

After a micro-slide (15 sq. ft.) occurred within the NCDOT's right of way, I contacted a former NCDOT employee who informed me that the steepness of the NCDOT's bank, within their right of way (r.o.w.), and their drainpipe were the causes of the problem. I then contacted Mr. Swain, who refused to undertake preventative measures within the NCDOT's r.o.w. I was told by other parties that if such measures weren't taken, the slides would eventually progress beyond the r.o.w. and damage my property (Exhibits 5 & 6).

Instead, Swain recommended that I take preventative measures within the NCDOT's r.o.w., including regrading the NCDOT' s bank within their r.o.w., building a retaining wall within the NCDOT's r.o.w. and moving the outlet of the NCDOT's drainpipe that is within their r.o.w. (No denials of these facts

were offered by the defendants).

I later contacted private engineers who concluded that the NCDOT was responsible for the slides, because of the steepness of their bank and their drainpipe. I also contacted Mr. Beck of the N.C. Dept. of Environment, Health and Natural Resources who stated that he believed that the NCDOT's drainpipe was the cause of the problem. His affidavit was attached to the complaint against Swain et al. If the NCDOT engineers, Swain, Martin and Murdock had admitted early on that the NCDOT's bank was too steep, and taken preventative measures within their r.o.w., the deprivation of my property rights could have been avoided.

My verified complaint (Exhibit # 2) states: " The other cause of the slides [in addition to the NCDOT's drainpipe] was the improper sloping ofthe NCDOT's bank..I later learned.. that there is a *Design Manual* published by the NCDOT. I was told by one of the authors of the manual, Mr. Shearin [an NCDOT engineer], that the NCDOT's bank... was not sloped according to the NCDOT's standards contained in the *Design Manual.* Swain, Martin and Murdock concealed from me the fact that the NCDOT's bank was not properly sloped according to the NCDOT's own standards."

The defendants never denied that the NCDOT's bank was improperly sloped, nor did they deny that the improper sloping of the NCDOT's bank was a factor in the deprivation of my property rights.

The defendants in *Langdon v. Swain, Martin, and Murdock* never denied my verified, detailed

accusations that they conspired together to conceal their, and the NCDOT's, responsibility for the deprivation of my property rights and their denial of my rights of access to the courts. *See: Ryland v. Shapiro,* 708 F. 2d 967 5th Cir. 1983).

The only denials they made were general, conclusory denials, in the "Appellee's Brief," unverified, denying that the defendants had deprived me of my property and denying that the defendants had harmed me in any way. Those conclusory denials are insufficient to establish good faith to defeat a default entry, or, a default judgment.

Instead of taking responsibility, Swain, and Murdock began blaming me for the problem, including false statements to the media. My lawsuit and motions for sanctions contain specific, detailed assertions, verified, that defendants Swain, Martin and Murdock intentionally gave false, conflicting reasons for the slides and for the destruction of the value of my property.

In my verified complaint (Exhibit 2) I also specifically stated that NCDOT attorney Michael Warren, had admitted that Swain, Martin and Murdock had intentionally made statements that they knew were false, that blamed me for the numerous slides that destroyed the value of my property. Other than the conclusory assertion of the defendants in their "Appellee's Brief" that they had not harmed me, the defendants have made no denial of these facts and submitted no contradictory affidavit by Mr. Warren, Swain,Murdock, Martin, or anyone.

Swain, Martin and Murdock never addressed my claims for the denial of my right to access to the courts, to petition for a redress of grievances, fraud, the destruction of my business, contractual interference, thus, admitting liability as to those claims, and bad faith. The lower courts never addressed any of those claims either.

I filed four motions for sanctions against Swain, Martin and Murdock, seeking costs and a default. The defendants never responded to those motions. The first motion for sanctions explained that Swain, Martin and Murdock had admitted responsibility for the deprivation of my property, contrary to their "Appellees' Brief."

The other verified motions for sanctions, unanswered, included detailed examples of the bad faith conduct of Swain, Martin and Murdock, including their numerous, false and contradictory statements regarding the causes of the slides and the concealing of evidence.

I had asked for copies of the construction records from Swain, when he was the District Engineer, and he refused to allow me to see them, contrary to the N.C. Public Records Law. (N.C.G.S. 132-1 et seq.).

I also related how defendants Swain, Martin and Murdock had agreed to be deposed in a state court proceeding and then reneged on the agreement in order to prevent me from getting meaningful access to the courts and a full and fair hearing of my claims. No answer was given by the defendants to these facts, and others, in my four verified motions for sanctions. Therefore, the motions should have been

granted and the assertions contained therein should have ben deemed admitted.

" When a party files a motion and the opposing party fails to respond, the court may construe such failure to respond as non-opposition to the motion or an admission that the motion was meritorious, may take the facts alleged in the motion as true.." 56 AM JUR 2D, "MOTIONS," SECTION 29, PAGE 24 (2000).

I also gave detailed, verified evidence in several of my papers of how the defendants' extension of time to answer has prejudiced me greatly.

Additionally, those defendants did not quickly move to correct the default. By 7-20-01 they knew they were in default. To try to remove the default they could have responded to my verified motions for: default entry, default judgment, and to strike the defendants' motions for extensions of time to answer. Instead of filing an answer, they sat back and waited approximately nine days, until the magistrate judge granted their amended motions for an extension of time to answer.

V. WAS THE ALLEGED ISSUE OF RES JUDICATA ERRONEOUSLY RAISED AND SHOULD IT HAVE BEEN DECIDED ?

Because the alleged issue of res judicata was not properly raised, and because the defendants in *Langdon v. Swain, Martin and Murdock* are in default, I shouldn't have been required to argue the alleged issue. I informed the Court of Appeals that: I wasn't waiving my objections to the way the issue was raised; the fact that

the defendants in *Langdon v. Swain, Murdock and Martin* are in default; that I didn't have notice and opportunity to respond to the alleged issue; that I wasn't waiving any other objections; and that I wasn't litigating the alleged issue by implied consent, nor am I doing so now.

As a pro se party, the raising of the alleged issue by the court, without a hearing, put me in a difficult position. If I failed to respond to the alleged issue, it might have been misconstrued as an admission that it was genuine. If I argued the alleged issue, it might be misconstrued as a a willingness to argue the issue by implied consent.

It is my understanding that if I responded in the hypothetical, and/or, the alternative, I would not be litigating the alleged issue of res judicata by implied consent. I asked the Court of Appeals to ignore, or strike, anything that might be construed as an intent to litigate the alleged issue by implied consent, and I do so now.

If the defendants hadn't been in default, and *if* the question of res judicata had been properly raised, and *if* I had been given notice and opportunity to be heard on the alleged issue, it still would have failed because:

(a) There was no hearing by the district court.

" Because the trial court did not subject its res judicata decision to the rigors of the adversarial process, we set aside the court's conclusion." *State of Nevada Employees Assoc., Inc. v. Keating*, 903 F. 2d 1223, 1225 (9th Cir.1990)

A hearing is particularly important for a pro se party. A litigant is entitled to a fair hearing

in the first instance. *Armstrong v. Manzo, supra; Ward v. Village of Monroeville,* 409 U.S. 57, 93 S. Ct. 80 (1972).

(b) The district court and the 4th circuit did not liberally construe my pleadings and other papers, contrary to *Haines v. Kerner, supra.*

(c) The dismissal was under 28 U.S.C., Sect. 1915(e)(2), inapplicable to my lawsuits.

" In the absence of.. statutory authority, it is inappropriate for trial court to dispose of the complaint *sua sponte* on an objection to complaint that would be waived if not raised by the defendants in timely manner." Sinwell v. Shapp, 536 F. 2d 15, 19 [5-6] (3rd Cir. 1976).

(d) The district court, by raising the alleged issue *sua sponte,* became an advocate for the defendants. *See: Porter v. Fox, supra,* at 274.

(e) The defendants in *Langdon v. Swain* filed no answer. " A failure to make any answer to a plaintiff's complaint waives the defense of res judicata." 47 Am Jur 2d JUDGMENTS, Section 717, page 186 (1995)

In limited situations, a court may raise the issue ".. where the latter action arises in the same court as an earlier action." 47 Am Jur 2d, supra at Section 708.

See also: U.S. v. Sioux Nation, 448 U.S. 371, dissenting opinion of Mr. Justice Rhenquist at 432. In my case, the lower courts didn't have a copy of the record of any previous case.

(f) The district court judge, Judge Thornburgh, dismissed my cases because of an alleged N.C. judgment, without considering, or citing, the N.C. law of res judicata. In a previous decision

the judge held that:

" ..federal courts are not allowed 'to employ their own rules of res judicata in determining the effect of state court judgments'..*In re Genesys Data Tech, Inc.*, 204 F. 3d 124, 127 (4th Cir. 2000). Hammel v. State Farm Mutual, 114 F. Supp. 2d 478, 481 (W.D.N.C. 2000).

(g) N.C. case law, and federal case law, state that res judicata is claim preclusion and the burden of proof is upon the one asserting it. To establish claim preclusion, N.C. law requires the submission of the entire record of the prior case. *See Reid v. Holden*, 88 S.E. 2d125, 129 [7-8] (N.C. 1955). The defendants did not do so.

" Generally, the plea of res judicata..cannot be determined from the pleadings alone." 47 Am Jur 2d JUDGMENTS, Section 719, citing *Hayes v. Ricard*, 112 S.E. 2d 123, 124 [7] (N.C. 1960).

" General rule is that party who wishes to avail himself of a prior judgment as res judicata must introduce the whole record of the prior proceeding." *Bryson v. Guarantee Reserve Life Insurance Co.*, 520 F. 2d 563 at 563[4] (8th Cir. 1975).

See also: Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294, 37 S.Ct. 506 at 506 (1917).

The alleged documents submitted by the defendants didn't include the pleadings, let alone an entire record, and they weren't certified, as required.

" In addition, we have reviewed the record on appeal and do not find therein an authenticated copy of the judgment of the Colorado Court of Appeals required under 28 U.S.C., Section

1738 in order to have full faith and credit effect." Horwitz v. St. Brd. of Med. Examiners, 822 F. 2d 1508, 1512 [4] (1987).

See also: Williams v. Liberty, 461 F. 2d 325, 327[3] (7th Cir. 1972); *Chung Young Chew v. Boyd*, 309 F. 2d 857, 859[14] (9th Cir. 1962); *Bank of State of Alabama v. Dalton*, 9 Howard (50 U.S.) 522, 528 (1850); *Northwestern Mut. Life Ins. Co., v. Stevens*, 71 F. 258 at 264 (8th Cir. 1895).

The defendants in *Langdon v. Tippett and Cooper* did file an answer and in it they alleged a defense of res judicata, however, they took no further action on the alleged issue. The alleged defense was based on a single alleged judgment. and no copy of any court documents, certified or uncertified, were attached to the answer. The defendants in *Langdon v. Swain, Martin and Murdock* filed no answer.

At the appeals level, the Court allowed the defendants' motion to submit supplemental material, despite my objections, that made reference to other alleged judgments in the state courts. The materials did not contain the pleadings of any case, nor the rest of any record, and no certifications, as required by law.

Furthermore, the Fourth Circuit allowed the defendants in *Langdon v. Tippett* to submit materials not referred to in their answer filed at the district court level. In their joint "Appellees' Brief," the defendants only referred to a single, alleged decision and the brief never referred to any of the other alleged decisions referred to in their supplemental materials. Stated otherwise, they were allowed to argue by implication.

In its opinion, the 4th Cir. did not refer to any specific case as the basis of res judicata.

(h) N.C. law requires privity between the parties to sustain res judicata. *Hayes v. Ricard, supra.*

" Privity,' for purposes of res judicata..denotes mutual or successive relationship to the same rights of property." State Ex Rel. Tucker v. Frinzi, 474 S.E. 2d 127 at 127[6] (N.C. 1996).

N.C. does not suscribe to the theory of "virtual representation." The lower courts held that the defendants in *Langdon v. Swain*, sued in their individual capacities, are in privity with the State of N.C., citing no case law.

" A government official sued in [their] personal capacity is not considered in privity with the government." Moore's Fed. Practice, 3d, Sect. 131.40[3][e], pages 131-148 (2001);

See also: Andrews v. Daws, 201 F. 3d 521, 525-26 (4th Cir. 2000); *Conner v. Reinhardt* 847 F. 2d 384, 385 (7th Cir. 1988). The fact that Swain, Martin and Murdock might be indemnified by the state does not alter the situation.

" If we were to hold otherwise, by passing comprehensive indemnification statutes, states could set up sovereign immunity as a defense for almost all individuals sued for damages in their individual capacities under Section 1983." Downing v. Williams, 624 F. 2d 612, 626[18-19] (5th Cir. 1980).

" In North Carolina, in order that a judgment in a former case may be held res judicata, there *must* be identity of parties.." Phipps v. Robinson, 858 F. 2d at 967[1] (4th Cir.1988). (emphasis added).

The lower courts' findings of res judicata were hinged on their erroneous finding that there was privity between the N.C.D.O.T engineers, in their individual capacities, and the State of N.C., without citing any supporting case law.

(i) The defendants referred to no valid court judgment in their "Appellee's Brief." Only a valid judgment may support res judicata and a void judgement is subject to collateral attack. *Collins v. Foreman,* 729 F. 2d 108,1_11[2] (2nd Cir. 1984). In their brief, un-verified, they mentioned only one prior alleged judgment. It was, and is, my contention that *if* the defendants had properly raised the question of res judicata, and if the defendants in *Langdon v. Swain* weren't in default, and if the defendants had supplied a certified copy of the record, the case would not support res judicata because the court that allegedly rendered the judgment lacked jurisdiction. I cited specific case law and facts in support of my contention. The defendants never even made a conclusory statement that the rendering court had jurisdiction and that the judgment was valid, not void.

(j)I also provided detailed, verified, assertions that I had no full and fair opportunity to litigate any of the present claims in any previous state court proceedings.

" As *Kremer* indicates, 456 U.S. at 482, 102 S.Ct. at 1898, neither state nor federal courts may give preclusive effect to a prior judgment rendered in a hearing conducted without constitutionality mandated due process protections.." Lee v. Winston, 717 F. 2d 888 at 899 [9] (4th Cir. 1983."

The defendants never denied these assertions, nor did they assert, even in conclusory terms, that I had a full and fair opportunity to litigate any of the present claims in any previous court.

(k) I also stated in my verified papers that; the N.C. state court remedies are inadequate, in theory and in practice, particularly as applied to me. The state remedies are also inadequate for pro se parties. I also stated that I had reserved my federal claims for the federal courts. The defendants never denied these assertions.

VI. SHOULD THE DISTRICT COURT JUDGE HAVE RECUSED HIMSELF, AND TRANSFERRED THE CASES AND DID THE COURT HAVE JURISDICTION ?

I asked that my cases be transferred to the Charlotte Division, W.D.N.C. because it is much closer to my residence in Florida. The actions of defendants Swain, Martin and Murdock have caused me great financial hardship. Having the cases heard in Asheville, not Charlotte, would cause me a great deal more time and expense.

I also asked that Judge Thornburgh recuse himself because of an appearance of partiality. *Langdon v. Tippett and Cooper* challenges the constitutionality of several N.C. statutes. Mr. Cooper is the N.C. Att. Gen., an elected office formerly held by Judge Thornburgh. While serving as attorney general, Judge Thornburgh was required to defend the statutes of N.C. against constitutional challenges. It is natural for Judge Thornburgh to identify with the interests of the State of N.C. and with Mr. Cooper. Additionally,

it is my understanding that Mr. Cooper was the head of the house and/or senate judiciary committees in N.C., while Judge Thornburgh was attorney general, and that they had a close working relationship. It is also my understanding that they are members of the same political party and that they may have contributed, financially and/or otherwise, to each others' campaigns.

" Any tribunal...not only must be unbiased but also must avoid the appearance of bias." *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 59 S.Ct. 337 at 337[5] (1969).

An article in the *Raleigh News & Observer* stated that Secretary Tippett contributed $29, 500 to former Gov. Hunt's election fund. Judge Thornburgh served under Gov. Hunt and is considered a close political ally and associate of his. It is possible that Mr. Tippett also contributed heavily to Judge Thornburgh' s election campaign for attorney general. I never stated, nor implied, that there was anything improper or illegal in these relationships, only that they gave the appearance of partiality.

With regards to *Langdon v. Swain et al.*, it is possible that Judge Thornburgh may have defended those defendants and/or their actions, as attorney general. I also supplied detailed, verified, un-denied allegations of related misconduct by T.L. Malonee, an attorney who, I believe, served under Judge Thornburgh when he was the N.C. Att. Gen. I showed that Mr. Malonee illegally removed relevant evidence from the NCDOT's district office to his office in

Asheville, contrary to N.C.G.S. 132-1, the Public Records Law. Additionally, the decision of Judge Thornburgh contains numerous, important factual errors. There are factual errors in the defendants brief and in the Fourth Circuit's decision, only one of which was corrected in the amended opinion. Also, Judge Thornburgh's dismissal of my cases, without notice and an opportunity to be heard, and under an inapplicable statute, indicates bias.

I also presented case law, un-refuted by the defendants, showing that the court did not have jurisdiction to dismiss my claims for a deprivation of my property, under N.C. law, without enjoining the noteholders and trustees, because they are necessary parties.

" When absence of necessary party is disclosed, trial court should refuse to deal with merits until the necessary party is brought in." *White v. Pate*, 304 SE 2d 199 at 199[3] (N.C. 1983).

Therefore, I respectfully ask that this petition for a writ of certiorari be granted.

I solemnly affirm, under oath, that everything contained herein is true and correct, except those matters asserted on information and belief, and those matters I believe to be true and correct. S.M.

Christopher Langdon, _____

Suscribed to and sworn before me, this the 10th, 11th S.M. day of June, 2002.

Notary Public Samuel Martin

Samuel Martin My Commission DD [illegible] Expires May 15, 2005

Samuel Martin/MY EXP. 15:5/15/05

COUNTY OF: ORANGE/STATE OF: FLORIDA

BEST AVAILABLE COPY